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**JAN 27 2016**

**Federal Communications Commission  
Office of the Secretary**

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January 27, 2016

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

**VIA HAND DELIVERY**

Re: Comments of XO Communications, LLC on the Further Notice of  
Proposed Rulemaking – WC Docket No. 05-25, RM-10593

Dear Ms. Dortch:

XO Communications, LLC ("XO"), through its attorneys, hereby submits comments on the Further Notice of Proposed Rulemaking in the above-referenced proceedings.

The submission contains Highly Confidential Information. In accordance with paragraph 15 of the Bureau's December 27, 2010 Second Protective Order (DA 10-2419) and paragraph 10 of the Data Collection Protective Order (DA 14-1424), enclosed please find two copies of the redacted version of this filing. Copies of the Highly Confidential version of the filing are being submitted under separate cover.

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Marlene H. Dortch  
January 27, 2016  
Page Two

Also enclosed is a duplicate copy of the submission. Kindly date-stamp the duplicate and return it to the courier.

Sincerely,



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**HIGHLY CONFIDENTIAL INFORMATION – SUBJECT TO  
SECOND PROTECTIVE ORDER IN WC DOCKET NO. 05-25, RM-10593  
BEFORE THE FEDERAL COMMUNICATIONS COMMISSION**

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

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**Federal Communications Commission  
Office of the Secretary**

In the Matter of: )

Special Access for Price Cap Local Exchange )  
Carriers )

WC Docket No. 05-25

AT&T Corporation Petition for Rulemaking to )  
Reform Regulation of Incumbent Local Exchange )  
Carrier Rates for Interstate Special Access )  
Services )

RM-10593

**COMMENTS OF XO COMMUNICATIONS, LLC ON  
THE FURTHER NOTICE OF PROPOSED RULEMAKING**

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January 27, 2016

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**SUMMARY**

In its examination of the competitiveness of the Dedicated Services (circuit and packet-switched services) market in this proceeding, the Federal Communications Commission (“Commission”) has an opportunity to right two missteps: its flawed 1999 Pricing Flexibility decision, which established unreasonable triggers for the deregulation of incumbent local exchange carrier (“ILEC”) DS<sub>n</sub> services (particularly channel terminations), and its many actions (and one inaction) deregulating the provision of ILEC Ethernet services. Correcting these errors is most important because in most areas of the country, markets for Dedicated Services are not competitive, resulting in the ILECs being able to charge supra-competitive prices. Further, ILECs have extended their market control by locking-up potential demand and by engaging in price squeezes. Consequently the Commission needs to adopt new triggers for deregulation of Dedicated Services, and, where markets are not competitive, the Commission should adopt interim prices for ILEC Dedicated Services that are just and reasonable.

The facts support XO Communications, LLC’s (“XO”) arguments. XO is among the largest facilities-based competitive local exchange carriers (“CLECs”) in the United States. It has networks in the core business areas of most major metropolitan areas, and it knows first-hand the value of being able offer innovative, high-quality services over its facilities. Yet, building networks, especially laterals to buildings, is very expensive, and despite engaging in network builds for over 15 years, its facilities reach only a fraction of even the most desirable buildings in the markets it covers. XO, therefore, needs to rely on facilities and service purchased primarily from ILECs, since other CLEC network coverage is not that dissimilar from XO. In these comments, XO brings to bear its extensive network and market knowledge and experience.

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Attached are declarations from senior XO personnel involved in building networks, procuring facilities and Dedicated Services at wholesale, and selling Dedicated Services to retail and wholesale customers. XO also supports its arguments with the work of economists that have analyzed the data submitted pursuant to the Mandatory Data Collection.

XO examines Dedicated Services markets using a traditional market power analysis, backed-up by the regression analysis of its economists. The following summarizes the main conclusions from its analysis:

Product Market Definition

The Commission should analyze separately the following Dedicated Services product markets: TDM or CBDS services (channel terminations), TDM or CBDS services (transport), Ethernet or PBDS services (channel terminations), Ethernet or PBDS services (transport), and Best Efforts Services. The Commission also should separately examine the provision of wholesale Dedicated Services where it finds that retail markets for Dedicated Services are not fully competitive.

Geographic Market Definition

The Commission should find the relevant geographic market for purposes of analyzing the Dedicated Services market is the individual commercial building. To facilitate analysis, it may be appropriate to aggregate buildings with similar customer demand characteristics that are adjacent or in close proximity in the same geographic area. However, in doing so, the Commission needs to be cognizant that many business customers have multiple locations in different areas and that they often take service from a single provider.

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Market Concentration

For both TDM and Ethernet channel terminations, the market is concentrated. ILECs have ubiquitous reach and are in most instances the only provider with facilities connected to the building. The presence of competitive provider facilities in commercial buildings, on the other hand, is limited, reaching a small fraction of buildings in any market. In addition, CLEC presence is generally limited to the densest areas where most commercial customers are located. This is evidenced by the data supplied to the Commission, which shows that [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]

[END HIGHLY CONFIDENTIAL] most of which are concentrated in select, dense areas of MSAs.

Market Pricing

The economists' empirical (regression) analysis relating the price charged for a dedicated connection to the number of in-building and nearby facilities-based providers "shows that ILEC prices to [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] [END HIGHLY

CONFIDENTIAL] This supports the findings of XO personnel as set forth in their



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declarations that ILEC prices remain supra-competitive even where some competitors are present in or near buildings.

Potential for Competitive Entry

Deploying competitive networks to commercial customers, particularly those requiring service in multiple locations, is a costly and time-consuming process, and therefore, rapid entry is likely only in select instances.

Anticompetitive Manifestations of Market Power

The anticompetitive effects of the ILECs' enduring market power are manifested in two principle ways with respect to channel terminations, in addition to purely supra-competitive prices: (1) through the ILECs' Commitment Plans for DS<sub>n</sub> services (so-called lock-up agreements); and (2) through evidence of ILEC price squeezes affecting Ethernet service.

XO submits that these facts demonstrate that ILECs have market power in the provision of Dedicated Services in most markets. It therefore proposes the Commission adopt the following new triggers for pricing flexibility:

DS<sub>n</sub> Channel Terminations

XO proposes that pricing flexibility for DS<sub>n</sub> channel terminations be granted within a Central Business District ("CBD") (or other contiguous, compact service area) when buildings that in the aggregate comprise more than 66% of the square footage in the relevant area and have four or more competitors with facilities in buildings over which TDM services are offered.

Ethernet Channel Terminations

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XO proposes that pricing flexibility for Ethernet channels terminations be granted within a CBD (or other contiguous, compact service area) when buildings that in aggregate comprise more than 66% of the square footage in the relevant area, have at least two CLECs in each building and at least two additional CLECs with fiber either in the same buildings or in close proximity to that location.

Dedicated Services Transport

XO proposes the Commission create density zones in an MSA and award relief when triggers are met within each zone. In particular, XO finds that competition is predominantly present in an effective manner in Tier 1 cities within much of the CBD and the first ring of suburbs. These should comprise two separate areas for purposes of the transport trigger, and then outer rings around the CBD and first ring of suburbs should be defined.

Finally, XO proposes the Commission adopt the following interim pricing regulations where the triggers are not met:

First, wholesale pricing should always be below retail for the same or substantially the same services so as to ensure there is no price squeeze. Second, wholesale prices for an ILEC's DS<sub>n</sub> special access, i.e., CBDS, should be no greater than the lowest per circuit rate available under any of the ILEC's commitment discount plans, regardless of term length, that is available or under any other ILEC volume and term discount arrangement for those services that the ILEC has in the same operating territory.

Wholesale Ethernet pricing should be subject to the same principles since ILECs enjoy the same market power with respect to DS<sub>n</sub> as to Ethernet services. Discounts between



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wholesale Ethernet and DSn access (relative to top of rate card retail rates) should be similar in the same operating territory, unless the ILEC offers even greater discounts to any of its wholesale customers, for example on a volume discount plan. For instance, if the DSn wholesale rates are 35% percent below top of rate card retail rates, wholesale Ethernet rates should reflect a similar discount on a temporary basis.

In sum, until the Commission can perform a more thorough examination of the ILECs' Ethernet rates, a proportionate reduction in rates is an appropriate proxy to help offset the ILECs' market power.

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AT&T Corporation Petition for Rulemaking to  
Reform Regulation of Incumbent Local Exchange  
Carrier Rates for Interstate Special Access  
Services

RM-10593

**COMMENTS OF XO COMMUNICATIONS, LLC ON  
THE FURTHER NOTICE OF PROPOSED RULEMAKING**

XO Communications, LLC (“XO”) hereby submits comments on the Further Notice of Proposed Rulemaking (“FNPRM”) in the above-referenced proceedings<sup>1</sup> where the Commission is evaluating competition in the marketplace for Dedicated Services<sup>2</sup> and seeking to determine where relief from regulation of those services is appropriate and whether earlier deregulatory measures should be reconsidered and undone.

In these comments, XO analyzes the markets for Dedicated Services – including both DS<sub>n</sub> services (Circuit-Based Dedicated Service (“CBDS”)<sup>3</sup>) and Ethernet services (Packet-Based

<sup>1</sup> *Special Access for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, *AT&T Corporation Petition for Rulemaking Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593, FCC 12-153, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 16318 (rel. Dec. 18, 2012) (“FNPRM”).

<sup>2</sup> Capitalized terms not defined herein will use the definitions in the FCC’s Glossary form the special access data collection: *See* <https://www.fcc.gov/general/special-access-data-collection-glossary-terms> (“Glossary”).

<sup>3</sup> *See Glossary*. As discussed herein, copper loops and DS<sub>n</sub> services may be used to provide retail Ethernet services.

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Dedicated Service (“PBDS”)<sup>4</sup> – using declarations from XO personnel involved in purchasing and selling these services and constructing networks. XO also reviews data submitted in response to the Commission’s Mandatory Data Request<sup>5</sup> in tandem with the evaluation of that data by economists retained by XO and other competitive providers (“Economists Report”).<sup>6</sup> From this vast store of information and extensive analyses, XO demonstrates that the incumbent local exchange carriers<sup>7</sup> (“ILECs”) have market power in the provision of Time Division Multiplex (“TDM”) DSn and Ethernet in all but the largest multi-tenant environments (“MTEs”), where competitors have built facilities, and for all but the smallest commercial customers for whom Best Efforts Business Broadband Internet Access Service (“Best Efforts”)<sup>8</sup> is an option. XO finally offers regulatory measures concerning Dedicated Services that the Commission should adopt to “update [its] special access rules to ensure that they reflect the state of competition today and promote competition, investment, and access to services used by businesses across the country.”<sup>9</sup>

This rulemaking is intertwined with the Commission’s pending investigation of certain tariff plans for special access services offered by AT&T, Verizon, CenturyLink, and Frontier

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<sup>4</sup> See Glossary.

<sup>5</sup> *Special Access for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, *AT&T Corporation Petition for Rulemaking Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593, Order on Reconsideration, 29 FCC Rcd 10899 (rel. Sept. 15, 2014). XO submitted data in response to this request.

<sup>6</sup> See Declaration of Jonathan B. Baker on Market Power in the Provision of Dedicated (Special Access) Services, WC Docket No. 05-25, RM 10593 (Jan. 22, 2016). (“Economists Report”).

<sup>7</sup> Unless otherwise stated, the term “ILEC” throughout these comments refers to price cap ILECs.

<sup>8</sup> See Glossary.

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(each of whom is a price cap ILEC) to determine whether these plans are “unreasonable, anticompetitive, and lock up the vast majority of demand for TDM-based business data services.”<sup>10</sup> As XO is certain the tariff investigation will demonstrate, the ILECs have used their market power in Dedicated Services to engage in anticompetitive acts to perpetuate and extend their market control and inhibit the development of facilities-based competition in Dedicated Services, including the deployment of competitive fiber.

XO concludes these comments by proposing new competitive triggers, which, more accurately than the pricing flexibility triggers the Commission suspended in 2012,<sup>11</sup> reflect the limited extent to which competition for special access services exists and which are based on XO’s experience in constructing and extending fiber networks and in both purchasing and selling special access services. Once the Commission employs these new triggers, it should promptly adopt regulations to ensure prices in areas where competition does not exist are just and reasonable and not unjustly or unreasonably discriminatory.

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<sup>9</sup> FNPRM, ¶ 56.

<sup>10</sup> *See Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans*, WC Docket No. 15-247, Order Initiating and Designating Issues for Investigation, 30 FCC Rcd. 11417 ¶ 1 (rel. Oct. 16, 2015) (“Tariff Investigation”).

<sup>11</sup> *See Special Access for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, *AT&T Corporation Petition for Rulemaking Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593, FCC 12-92, Report and Order, 27 FCC Rcd 10557 (rel. Aug 22, 2012) (“Suspension Order”). The price flex rules were adopted in 1999. *See Access Charge Reform*, CC Docket No. 96-262; *Price Cap Performance Review for Local Exchange Carriers*, CC Docket No. 94-1; *Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers*, CCB/CPD File No. 98-63; *Petition of U.S. West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, CC Docket No. 98-157, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, 14224, ¶ 1 (1999) (“Pricing Flexibility Order”).



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**I. INTRODUCTION**

A. The Importance of the Commission's Review of Dedicated Services  
Competition in Business Markets

Businesses large and small depend on access to Dedicated Services with performance and other service-level guarantees for reliable voice and high performance data communications, including interoffice networking and dedicated Internet access. Until the 1996 Telecommunications Act,<sup>12</sup> these commercial consumers were limited in all but rare instances to subscribing to Dedicated Services provided by ILECs. As a result, prices were high and service innovation low. Over the past two decades, as competitive local exchange carriers ("CLECs") have entered the marketplace, the ILECs' monopoly control has begun to erode in select circumstances. Commercial consumers in buildings that have multiple facilities-based competitors in-building or, to a lesser extent, in those buildings that are in close proximity to multiple competitive providers' fiber facilities have benefitted from lower-priced, more cutting-edge services offered by CLECs. But the facilities-based competition is still limited to a relatively smaller number of buildings in each metropolitan area, and the evolution to more robust competition, while promising, is just beginning.

As a result, ILECs continue to have market power for the provision of Dedicated Services in virtually all locations around the country. This holds for customers with lower performance needs who continue to access TDM services over ILEC facilities (regardless of whether they purchase directly from an ILEC or from a CLEC that acquires the facilities or services from the incumbent at wholesale), as well as for customers who use higher performance Ethernet services

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<sup>12</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of Title 47 of the United States Code) (the "1996 Act").

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because CLECs either use ILEC facilities or services or have only been able to economically deploy fiber to a relatively small number of commercial buildings in select areas.

The continued market power of ILECs should not be surprising. After all, the incumbents took many decades to build their networks, and they had the advantage of doing so while being the only “game in town.” In contrast, to break that monopoly power, not only must competitors raise enormous amounts of capital to build out backbone network facilities and then laterals to end user locations, they must obtain public and private rights-of-way (“ROW”) and access rights to buildings, and then they need to engage in the construction projects. Further, these network builds cannot be done on speculation. CLECs need to sign up a sufficient number of customers in advance to justify a lateral construction, and they must complete installation and begin providing service in a timely manner or the customer(s) may be lost. Meanwhile, virtually all of the potential CLEC customers already subscribe to incumbent services.

In enacting the 1996 Act, Congress recognized many of these barriers to competition, and it added substantial authority to the Communications Act of 1934, as amended,<sup>13</sup> to enable CLECs to access ILEC facilities and services on a wholesale basis at rates, terms, and conditions that would foster competition while they build their networks. Unfortunately, within 10 years of the new law, the Commission adopted a series of orders limiting CLEC access to ILEC facilities and services under the mistaken notion that robust facilities-based competition was well underway. First, the Commission, using predictive judgment, permitted the ILECs to obtain regulatory pricing flexibility or “price flex” relief in the provision of DS1 and DS3 CBDS based

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<sup>13</sup> 47 U.S.C. § 151 *et seq.* (the “Communications Act”).

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on flawed competitive triggers.<sup>14</sup> Then in the *Triennial Review Orders*, it limited competitors' access to unbundled network elements ("UNEs").<sup>15</sup> Additionally, the Commission effectively eliminated its oversight of Ethernet services provided by ILECs on the mistaken assumption that competition would rapidly and pervasively develop for Ethernet services.<sup>16</sup> These combined actions undermined the environment the 1996 Act created to foster the development of competition and had major negative consequences in the marketplace.

Shortly after the *Triennial Review Orders*, the two largest competitive providers – AT&T and MCI – agreed to be acquired by Regional Bell Operating Companies, leading to today's AT&T and Verizon. And the ILECs leveraged the "price flex" relief they received to impose lock-up requirements on CLECs seeking to purchase their wholesale DSn inputs to provide Dedicated Services at rates that were more reasonable than the ILECs' month-to-month rates, which remained supra-competitive. These factors have further limited the extent of retail competition.

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<sup>14</sup> See *Access Charge Reform et al.*, CC Docket No. 96-262 *et al.*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd. 14221, 14257-307, ¶¶ 67-178 (1999).

<sup>15</sup> See *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers et al.*, CC Docket No. 01-338 *et al.*, Report and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd. 16978, 17102-236, ¶¶ 197-417 (2003); *Unbundled Access to Network Elements et al.*, WC Docket No. 04-313 *et al.*, Order on Remand, 20 FCC Rcd. 2533, 2558-96, ¶¶ 43-107 (2005) (collectively the "Triennial Review Orders").

<sup>16</sup> See, e.g., Verizon Telephone Companies' Petition for Forbearance from Title II and Computer Inquiry Rules with Respect to their Broadband Services Is Granted by Operation of Law, WC Docket No. 04-440, News Release (rel. Mar. 20, 2006); see also e.g., *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to its Broadband Services*; *Petition of BellSouth Corporation for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to its Broadband Services*, WC Docket No. 06-125, Memorandum Opinion and Order, 22 FCC Rcd 18705 (2007).

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In the *Suspension Order*, well over a decade after the “price flex” rules were adopted and then many years after the ILECs had received relief in most major metropolitan areas, the Commission finally admitted that its pricing flexibility triggers “are not working as predicted”<sup>17</sup> and questioned its prediction that “collocators would eventually build their own channel terminations to end users.”<sup>18</sup> So, in the face of this dubious record, the Commission in this proceeding has an opportunity to right earlier wrongs by establishing new triggers for deregulation of all ILEC provided Dedicated Services – CBDS and PBDS – that reflect competitive realities and by regulating prices, terms, and conditions for those services where competition does not exist.

B. XO Communications: Network Deployments, Service Offerings, and Reliance on Dedicated Services Provided by ILECs

XO is a facilities-based CLEC. It has metropolitan area fiber-based networks in [BEGIN  
HIGHLY CONFIDENTIAL] ■ [END HIGHLY CONFIDENTIAL] large and mid-sized metro areas, most of which were installed more than a decade ago, over which it provides a variety of retail services to medium to large business and enterprise customers and Dedicated Services at wholesale to carrier customers.<sup>19</sup> XO metro and last mile fiber provides connections to more than [BEGIN HIGHLY CONFIDENTIAL] ■■■ [END HIGHLY  
CONFIDENTIAL] buildings over which XO provides “on-net” (Type I) services to thousands of customers.<sup>20</sup> XO provides service to many more end users and carriers using facilities and

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<sup>17</sup> See *Suspension Order*, ¶ 1.

<sup>18</sup> See *id.*, ¶ 68.

<sup>19</sup> Declaration of George Kuzmanovski ¶ 4 (“Kuzmanovski Declaration”).

<sup>20</sup> *Id.*



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services it leases and purchases (“Type II” facilities or “off-net” services), in combination with XO’s own metro network facilities or on a standalone basis.<sup>21</sup> In addition, XO’s metro network facilities are connected to its nationwide fiber backbone.<sup>22</sup>

From its inception, XO has offered TDM phone and TDM DSn services to retail customers and carriers.<sup>23</sup> XO’s provision of these services relies extensively on ILEC provided loop or channel termination inputs, either UNEs or Dedicated Services.<sup>24</sup> XO connects these last mile ILEC facilities to its metro networks at its collocations at ILEC central offices wherever possible, and otherwise uses the transport of ILECs or other CLECs to get these end user connections back to XO’s network.<sup>25</sup>

About ten years ago, XO began to provide Ethernet services over its facilities, but much more frequently, XO does not have facilities in or sufficiently near the customer’s premises and XO must provide the Ethernet services using ILEC facilities or services.<sup>26</sup> Using ILEC provided copper-based DS0 UNE loops, XO offers Ethernet over Copper (“EoC”) at speeds up to 100 Mbps, depending upon the number of loops available, the length of the copper loops, and the

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> XO segments the retail market in terms of customer size, rather than by type of service offering or industry sector. [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]  
[REDACTED] [END  
HIGHLY CONFIDENTIAL] Declaration of James A. Anderson, ¶ 7 (“Anderson Declaration”).

<sup>24</sup> Anderson Declaration ¶ 5; Declaration of Michael Chambless ¶ 18 (“Chambless Declaration”).

<sup>25</sup> Chambless Declaration ¶ 8.

<sup>26</sup> Anderson Declaration ¶ 5.



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quality of the copper pairs.<sup>27</sup> EoC is distance sensitive – the end user location needs to be less than two miles from the closest Serving Wire Center, the copper pairs have to be clean end to end (i.e., no bridge taps), and multiple copper pairs must be available (e.g., five to eight copper pairs are required to support speeds of 20 Mbps, for example, depending upon length).<sup>28</sup> Higher EoC speeds are achieved by banding together more loops of even shorter length, but availability of copper loops to support EoC to any given location is not within XO's control.<sup>29</sup> Consequently, XO often cannot access sufficient numbers of copper DS0 loops that are short enough and of sufficient quality to provide EoC speeds necessary to meet a customer's Ethernet requirements. In such cases, XO's choice is typically to look for wholesale Ethernet service which it can resell.

XO also uses bonded DS1 UNEs to provide Ethernet over Serial ("EoS") service up to 10 Mbps, although the typical customer for EoS takes services at speeds of 3-4.5 Mbps (which requires 2-3 DS1s).<sup>30</sup> DS3 special access supports XO Ethernet service up to 44 Mbps (1 DS3) or 88 Mbps (2 DS3s), and for even higher speeds, XO will use ILEC-provisioned Ethernet. EoS uses finished services with an inherent capacity limit in each DS1 of 1.544 Mbps<sup>31</sup> (unlike EoC, where XO provides the electronics over dark copper and can scale the services to a certain extent). XO has never found EoS to be a major offering, in large part because to purchase finished services and convert them to Ethernet requires pricing (to cover XO's input costs) that is

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<sup>27</sup> *Id.* ¶ 17.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* ¶ 18.

<sup>31</sup> *Id.*

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much higher than other market alternatives.<sup>32</sup> Further, the capacity of EoS offerings is rigid – not scalable – and so not as attractive to customers who anticipate growing needs.<sup>33</sup> As a result, EoS services are in decline.

XO continues to invest in network facilities, including through its \$500 million “On-Net Initiative” launched in 2014.<sup>34</sup> XO’s decisions to build additional network facilities are targeted toward and triggered by immediate service opportunities. Building network facilities is a very expensive undertaking, where capital is spent upfront and revenues often lag, and thus XO proceeds cautiously and does not engage in speculative builds.<sup>35</sup> Moreover, XO’s main focus is to build where it can leverage its existing network assets to reach additional customer locations. – potentially a few thousand additional buildings – with “on-net” services to meet their present demand.<sup>36</sup>

Metro areas where XO has facilities present a number of advantages for XO, which does not have the resources to be in every metropolitan area.<sup>37</sup> Where XO has a network, it knows the marketplace, has a sales force in place, and understands whether it can cost-effectively build facilities to a customer in a location it does not serve with its network or whether it should buy

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> Kuzmanovski Declaration ¶ 7. While XO can expand its network materially with \$500 million of capital, it is still a small amount in comparison to the amount required to fully deploy to all buildings in even one Metropolitan Statistical Area (“MSA”), let alone multiple MSAs.

<sup>35</sup> Kuzmanovski Declaration ¶ 10. In the late 1990s and early 2000s, prior to the *Triennial Review Orders* and the exit of AT&T and MCI as local competitive providers, XO engaged in extensive building projects as it entered the markets in which it currently competes. The type of capital funding for such expansion with expansive metro ring fiber into new markets is no longer available today as a market reality.

<sup>36</sup> Kuzmanovski Declaration ¶ 7; Anderson Declaration ¶ 5.

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Type II facilities or services to reach customers.<sup>38</sup> As a general rule, [BEGIN HIGHLY  
CONFIDENTIAL] [REDACTED]

[REDACTED] [END HIGHLY CONFIDENTIAL]<sup>39</sup> Even then, because it has a  
limited construction budget and may lack operational capabilities in a specific area, XO cannot

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37 Kuzmanovski Declaration ¶ 7.

38 *Id.*

39 *Id.* ¶ 15. For an average build with a [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]  
[END HIGHLY CONFIDENTIAL] payback, the cost may be as high as [BEGIN  
HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] with the  
current average trending towards [BEGIN HIGHLY CONFIDENTIAL] [REDACTED].  
[END HIGHLY CONFIDENTIAL] Kuzmanovski Declaration ¶ 16. In certain  
markets, *e.g.* New York City, the cost to build is much higher, and therefore to meet its  
payback criterion, XO will only build where the revenue opportunity is sufficiently  
greater. If the MTE has more than [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END  
HIGHLY CONFIDENTIAL] tenants, XO may factor in the revenue opportunity the  
build would create to sign up potential tenants in addition to the initial new customer or  
from selling to carriers at wholesale. But even then, XO is not building on speculation,  
and there must be at least one customer that will cover a meaningful part of the capital  
and operating expenditures associated with the prospective build. Kuzmanovski  
Declaration ¶ 20. Another factor for XO in choosing to build to a customer in an MTE  
who, standing alone, will not contribute enough revenues to recover the full capital costs  
in [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY  
CONFIDENTIAL] is the expense for renting space for equipment in the building.  
Kuzmanovski Declaration ¶ 23. If the landlord manages a group of buildings in an area,  
XO will often try to [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]  
[REDACTED]  
[REDACTED] [END HIGHLY CONFIDENTIAL] Kuzmanovski Declaration ¶ 23. Rent  
costs, like upfront construction costs, must be recovered through the monthly charges.  
Where rent charges are high, they can make a build impractical that is otherwise  
economic from a financial matter. Kuzmanovski Declaration ¶ 23. At one time, XO used  
a [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY  
CONFIDENTIAL] payback period but reduced that to drive decisions that focus on  
maximizing XO's existing assets to generate margin and create a self-sustaining business  
model. Kuzmanovski Declaration ¶ 14.



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construct to all buildings that may satisfy this criterion and must continue to rely predominantly on Type II services purchased from ILECs.<sup>40</sup>

Even if is the threshold criterion of whether it is economic to build to satisfy a new customer opportunity is satisfied, XO must also take into consideration its ability and the cost to access the building over and above pure construction costs. Public ROW permits are required, and XO will take into account the period of time that is typically required to obtain permits in the particular jurisdiction, as well as the administratively imposed expenses associated with the build as a result of such factors as one-time and recurring franchise or permit fees and restoration obligations.<sup>41</sup> In some situations, XO simply cannot build because there may be a moratorium, and XO will not be able to lay its own conduit where needed.<sup>42</sup>

Further, XO must obtain the permission of the owner or manager to access the building. At the time XO makes its “buy versus build” decision, it has limited tools to assess whether a

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<sup>40</sup> Kuzmanovski Declaration ¶ 11.

<sup>41</sup> *Id.* ¶ 29.

<sup>42</sup> *Id.* ¶ 29. ILECs have advantages over XO and other competitors when it comes to public ROW access. For example, in many markets, ILECs are able to lay new conduit in public ROW under legacy franchise agreements that uniquely benefit them. Kuzmanovski Declaration ¶ 30. In many cities, XO and other competitors under their franchise agreements must pay a per linear foot fee to occupy municipal (or other local or state government) public ROW. Kuzmanovski Declaration ¶ 30. By contrast, ILECs often pay a smaller fee, or even no fee at all, to lay conduit. For example, in New York City, XO is required to pay franchise fees related to telecommunications services, while the ILEC (Verizon) is not required to pay this franchise fee. Kuzmanovski Declaration ¶ 30. In other municipalities, XO and other competitors pay franchise fees as a percentage of gross revenues. Kuzmanovski Declaration ¶ 31. But even in these instances, ILECs have an effective advantage over their competitors where they pay a lesser fee or no fee at all. Kuzmanovski Declaration ¶ 31. Despite the fact that the construction of a lateral or extension of a ring in and of itself does not increase the competitors’ franchise fee payments in percentage of gross revenues situations, because the purpose of the build would be to serve additional customers, and thus receive increased revenues, the increased costs from the franchise put them at even a greater disadvantage relative to ILECs that pay a lower rate or no franchise fee at all. Kuzmanovski Declaration ¶ 31.

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particular owner or landlord will object to XO building fiber to the building.<sup>43</sup> At best, XO's team may have notes from previous attempts involving the owner or landlord, perhaps at a different location.<sup>44</sup> Building owners often are not interested in having providers in addition to the ILEC to construct to one of their buildings. This is a potentially absolute obstacle for XO because building owners have no regulatory obligation (other than in Texas) to permit access to their properties.<sup>45</sup> Indeed, even if XO can lay its fiber through existing conduit of another provider, which Commission regulation requires the other provider to make available and which is almost always preferable because of the lower cost, the building owner can still withhold the rights to XO to access the building with its facilities.<sup>46</sup> Unfortunately, XO finds out about these types of obstacles later in the process of considering whether to build, and, in XO's experience the lack of building owners' cooperation happens not infrequently.<sup>47</sup> Even today, the ILECs are almost certainly the first to construct facilities to a building or building center. Indeed, owners and developers often will invite the ILECs to build as construction is ongoing. In several major metropolitan areas such as New York, San Francisco, Chicago and Boston, XO is routinely denied access to properties based on the property owners' decisions made during the

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<sup>43</sup> Kuzmanovski Declaration ¶ 32.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* ¶ 32. See *Promotion of Competitive Networks in Local Telecommunications Markets et. al.*, WT Docket No. 99-217 et al., First Report and Order and Further Notice of Proposed Rulemaking *et al.*, 15 FCC Rcd. 22983 (2000). In this decision, the Commission adopted its regulations precluding carriers from enforcing or entering into exclusive agreements for MTEs, but it declined any attempt to assert jurisdiction over MTE owners.

<sup>47</sup> Kuzmanovski Declaration ¶ 32.



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“construction.”<sup>48</sup> For instance, property owners often have the ILECs install conduit and facilities at the outset and do not want new carriers to physically change the “building aesthetics” through new construction.<sup>49</sup>

Such additional and unexpected costs or hurdles arising from public ROW access and dealing with building owners and landlords often lead XO to cancel a build that otherwise may be economic.<sup>50</sup> As of January 4, 2016, as part of its On-Net Initiative, XO has cancelled over [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] builds that it had first approved. In comparison, XO has completed approximately [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] builds, and another [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] are in process (although some of those may ultimately be cancelled for similar reasons).<sup>51</sup>

Because it seeks to recover its capital expenses within [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] of a build, XO does not have a hard and fast rule regarding the maximum distance beyond which it will build rather than buy, or the minimum level or capacity of service.<sup>52</sup> Nonetheless, based on XO’s activity over 2014 and 2015 under its On-Net Initiative, of the [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] builds that XO undertook during that period, [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] were less

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<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* ¶ 35.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* ¶ 14.

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than [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] aerial<sup>53</sup> feet, and [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] were less than [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] aerial feet.<sup>54</sup> Mr. Kuzmanovski, XO's Vice President of Access Planning and Implementation, explains in his Declaration that "XO is extremely unlikely to build if the building is more than [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] linear feet from a splice point on XO fiber, and the overwhelming number of builds XO undertakes have been within [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] linear feet" of a splice point.<sup>55</sup>

This rule of thumb, however, has many exceptions. Even short builds in certain metro jurisdictions can often be prohibitively expensive, often because of terrain and layout and government requirements. In San Francisco's central business district, for example, the costs can be as high as [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] tending to reduce the length of builds to customer premises that are likely to be feasible.<sup>56</sup>

XO is also one of the nation's largest holders of wireless LMDS (Local Multipoint Distribution Service) licenses. However, to date, XO has not seen a meaningful market for establishing wireless links in lieu of building fiber on a standalone basis. To the extent that XO provides LMDS to a customer, it is a customer that XO also serves on a wireline basis. The

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<sup>53</sup> As used here, the term "aerial" means as the bird flies, in a straight line, not that the facilities were deployed above ground.

<sup>54</sup> Kuzmanovski Declaration ¶ 24.

<sup>55</sup> *Id.*